approach.[968]

iii. Discussion.

396. We have explained and justified in detail adoption and application of the benchmark approach that will be used to set the initial per channel rate for the basic service tier, and application of the price cap to govern future rate increases once the initial rate level has been set by comparison to the benchmark. We explained that the statute expresses a concern that rates may be unreasonably high due to lack of effective competition, and our industry survey reveals an average competitive rate differential of approximately 10 percent. This competitive rate differential exists for cable programming service rates as well as for basic service tier rates. We also addressed the considerations concerning application of a price cap to basic tier rates, the annual inflation adjustment, and the appropriate treatment of external costs. These considerations are applicable to the cable programming services tier as well. In addition, as we have explained in connection with our discussion of whether we should establish a low cost basic service tier, we have determined that a tier-neutral implementation of rate regulation of cable service is preferable to establishing different rate regulation schemes for basic and higher tiers. Accordingly, we will adopt the same benchmark approach for purposes of resolving complaints regarding cable programming services as for the basic service tier and apply it in the same manner to determine the initial permitted per channel rate for cable programming services.[969] Further, we will adopt

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threshold at, for example, a two standard deviations from the norm. Only those cable systems whose prices are beyond the threshold on a per channel basis for their category would be subject to complaint for unreasonable programming service rates. The Commission could adjust the two standard deviation formula if it proves to be excessively or insufficiently encompassing. See, e.g. Comcast Comments at 35-36; TimeWarner Comments at 43.

[968] This benchmark approach would require the Commission to survey sample data each year that satisfies the major factors in the Section 623(c) of the Cable Act. The Commission would then publish these data and use them to establish guidelines for answering complaints concerning unreasonable rates for cable programming services. NCC Comments at 27.

[969] As indicated, in accordance with determinations that our rate regulations should be tier neutral, the benchmark expresses the competitive rate level across all tiers. The method for determining the appropriate rate level by comparison to the benchmark is the same for the basic service tier and cable programming services, and is described in detail in FCC Form 933.

the same price cap requirements for purposes of resolving cable programming services complaints as for the basic service tier.[970] Thus, we adopt the same annual adjustment index and the same requirements for, and treatment of, external costs for cable programming services as was adopted for the basic service tier.

397. Thus for purposes of adjudicating an initial complaint and any future complaint received after a rate increase, a per channel rate for cable programming services at or below the benchmark in effect at the time the complaint is filed will be considered reasonable and will be the permitted rate.[971] For a system with rates at the time of regulation that are above the benchmark, the permitted rate level for such systems will be determined by a further comparison to the benchmark of the system's rates in effect on September 30, 1992. If the system's September 30, 1992 rates were also above the benchmark its permitted rate shall be its September 30, 1992 per channel rate reduced by the industry-wide competitive rate differential of 10 percent, (or to the benchmark, whichever is less), adjusted forward for inflation.[972] If the system's rates in effect on September 30, 1992 were below the benchmark, the permitted rate

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[970] The Cable Act of 1992 requires that we consider, in fashioning regulations governing rates for cable programming services, the history of rates for the system including their relationship to changes in general consumer prices. Communications Act, § 543(c)(2)(C), 47 U.S.C. § 623(C)(2)(C). As explained in para. 205-207, supra, we have considered the use of past regulated rates to determine regulated rate levels. For the reasons stated there, we choose not to incorporate directly past regulated rates into our scheme for regulation of cable programming services. However, our survey was based on rates in effect on September 30, 1992 and thus our benchmark formula is industry based on the history of rates as existing at that time. We determine that the rates of systems subject to effective competition shall be given greater weight in fashioning regulations to govern cable programming services than this statutory factor.

[971] Rates for cable programming services will become subject to regulatory review at the time a complaint is filed with the Commission. Rates in effect on the date on which the complaint is filed shall be the rates to which the initial comparison to the benchmark is made.

[972] As we explain below, the permitted rate is also to be adjusted based on changes in the number of channels provided since September 30, 1992. We also note that the permitted rate excludes charges for equipment, since equipment is charged and regulated separately from service charges.

shall be the benchmark rate adjusted forward by inflation. Our price cap rate will then be used to evaluate to the reasonableness of rates for cable programming services with respect to subsequent complaints. Price cap standards will be the same as for the basic service tier.

(3) Secondary Cost-of-Service Showings

i. Background.

398. In the Notice, we proposed to permit cable operators to justify a rate above benchmark or capped levels based on cost-of-service showings. We solicited comment on what cost-of-service standards should be adopted to govern the extent to which cable operators would be able to justify rates based on costs.

ii. Comments.

399. Commenters raise the same points concerning secondary cost-of-service showings for cable programming services as for the basic service tier. Cable operators and most commenters agree that we should permit cable operators to exceed the benchmark rate for cable programming services based on costs.[973] Some commenters, however, contend that we should not establish standards and procedures by which cable operators may raise rates based on costs, but rather should require rates to remain at the benchmark level unless that would be confiscatory for the cable operator.[974] Commenters did not specifically urge adoption of separate cost-of-service standards for cable programming services.

iii. Discussion.

400. We have explained above the reasons for permitting cable operators to exceed capped levels for the basic service tier if they make an adequate cost showing.[975] We explained that the starting capped rate is based on industry data and does not necessarily reflect individual systems' costs of providing service. We further noted that an overly tight cap on rates could hinder the ability of operators to make improvements that would benefit consumers and that Congress did not intend that cable operators be required to provide service at a loss. These same reasons apply with equal force in the complaint

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[973] See, e.g. CIC Comments at 36-37; Cox Comments at 31-32; Hawaii Reply Comments at 3.

[974] See, e.g. NATOA Comments at 44-46.

[975] See paras 258-264, supra.

context for cable programming services. Commenters have not raised different concerns for cable programming services.[976] Accordingly, when reviewing cable programming service complaints, we will permit cable operators to exceed the benchmark rate for cable programming services if they can justify such departures based on costs.[977]

401. Similarly, we conclude that we should adopt cost-of-service standards for the Commission to apply to determine the extent to which cable operators may exceed capped rates for cable programming services. Such standards are necessary to define the costs and level of profits that will permit a reasoned decision as to whether an existing rate or increased rate is unreasonable. Further, cost-of-service standards will permit the Commission to strike a reasonable balance between the interests of consumers in paying a fair rate and of cable operators in recovering their costs and earning a reasonable profit. Accordingly, as for the basic service tier, we will additionally establish cost-of-service standards to govern cable programming services. However, as for the basic service tier, the record does not permit the Commission to fashion at this time cost-of-service standards with assurance that the standard will balance these two conflicting interests in a way that serves the public interest. Accordingly, as already indicated, we will shortly adopt and issue separately a Second Further Notice to establish such standards for cable service including cable programming services.[978]

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[976] The Cable Act of 1992 requires that we consider in establishing rates for cable programming services the system's rates as a whole for all cable programming, cable equipment and cable services provided by the system, other than programming provided on a per channel or per program basis. Communications Act, Section 623(c)(2), 47 U.S.C. Section 543(c)(2). Our requirements for cable programming services take this factor into account by providing that permitted rates are based on averaged rates across all tiers. In addition, we can consider in cost-of-service showings overall earnings for all regulated services. Cost-of-service showings also permit us to take into account the statutory factor of capital and operating costs. Id.

[977] As we pointed out for basic service, however, the fact that an operator has incurred costs does not necessarily establish a right to recover those costs from subscribers. The extent to which costs can be recovered from subscribers will be governed by cost-of-services principles designed to be fair to cable operators and their subscribers.

[978] Pending this rulemaking we will review showings by cable operators seeking to justify rates above the otherwise permitted level based on costs on a case-by-case basis. Under the procedures we are adopting for resolution of complaints alleging excessive

(4) Installation or Rental of Equipment Used to Receive Cable Programming Services

(a) Equipment Subject to Regulation as Cable Programming Services

i. Background.

402. The Cable Act of 1992, in defining "cable programming services," includes within the scope of this term installation and equipment rented to receive cable programming service.[979] However, in the Notice, we noted some ambiguity in the Act as to whether Congress "intended to limit regulation, on the basis of actual cost, to that equipment only used for basic tier services."[980] We stated our belief that equipment used for the receipt of cable programming service is to be regulated by the Commission based upon the mandates of Section 623(c) of the Communications Act, under the "not unreasonable" standard.[981]

403. In the Notice, we asked "what customer equipment, if any, Congress intended to include within the definition of cable programming services."[982] In particular, we asked "whether the Act contemplates any regulations applicable to such equipment beyond those applicable to cable programming services generally."[983] We also sought comment on whether "we should adopt uniform rules to govern regulation of rates for equipment used to receive the basic tier and for equipment falling within the definition of "cable programming service."[984]

ii. Comments.

404. The majority of cable operators argue that a use test should determine how equipment and installation is

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rates for cable programming services, cable operators may maintain their rate in effect pending our adjudication of the complaint subject to refund liability dating from the day the Commission received the complaint.

[979] Communications Act § 623(l)(2), 47 U.S.C. § 543(l)(2).

[980] Notice, 8 FCC Rcd at 525-526, para. 65.

[981] Notice, 8 FCC Rcd at 525, para. 64.

[982] Notice, 8 FCC Rcd at 530-531, n. 129; see id. at 525-526, para. 65.

[983] Notice, 8 FCC Rcd at 531, n.129.

[984] Notice, 8 FCC Rcd at 531, n.129.

regulated, with the regulation dependent upon the level of cable service the subscriber receives.[985] Some other cable operators maintain that cable programming service equipment should not be subject to any additional regulation, as long as rates for the cable programming service tier, as a whole, are not unreasonable.[986] Most of these parties also allege that adopting actual cost as a standard for equipment used to receive cable programming services would be contrary to the language and legislative intent of the Cable Act of 1992, and would stifle competition and the development of new technology.[987] Some parties also maintain that equipment that is used to receive pay per channel or per program services is unregulated only if it is not used to provide either basic or programming services.[988] These parties claim that this is consistent with the legislative intent behind the Cable Act of 1992.[989]

405. Still other parties argue that all equipment should be regulated based upon the actual cost standard, no matter what kind of service or programming the equipment is used to receive.[990] These parties allege that this meets Congressional intent, in that Congress intended that low rates should be charged for all cable equipment.[991]

iii. Discussion.

406. Section 623(b)(3) of the Communications Act directs the Commission to establish standards, based upon actual costs, for the "rates and prices for the installation and lease of the equipment used by subscribers to receive the basic service

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[985] See, e.g. Continental Comments at 38; InterMedia Comments at 22; Nashoba Comments at 68; AdelphiaII Comments at 67; TCI Comments at 31; Armstrong Comments at 22.

[986] See, e.g. Intermedia Comments at 31-32; Armstrong Comments at 30.

[987] See, e.g. TCI Comments at 32-36; TimeWarner Reply Comments at 45; Comcast Comments at 46 and 50 and Attachment, "Technology Considerations."

[988] CFA Reply Comments at 12.

[989] See, e.g. NATOA Comments at 48-49; Municipal Reply Comments at 44-47.

[990] See, e.g. Sommerville Comments at 5-6; NewBedford Comments at 5; Schaumberg Comments at 9; Conn Comments at 12.

[991] See, e.g. Conn Comments at 12.

tier."[992] As we discussed earlier in this Report and Order, we have concluded that Section 623(b)(3) of the Communications Act requires us to regulate rates for any rental of equipment used to receive basic service, as well as associated installations required to receive basic service, on the basis of actual cost, regardless of whether this equipment or installation is also used to receive a higher level of cable service.[993] However, we do not believe that the statute requires us to apply the actual cost standard to the rental of equipment or an installation that is used solely to receive cable programming services. The regulatory standard governing the rates for installation and the lease of equipment used solely to provide cable programming services, or to provide both cable programming services and per channel or per program services, is the not "unreasonable" standard found in Section 623(c) of the Communications Act.

407. Nonetheless, we have determined that equipment used to receive cable programming services shall also be subject to the same actual cost standard we implement for basic tier equipment. While we are not required to apply this standard, we believe that application of this standard will be less burdensome than would application of separate standards for equipment used to receive separate tiers. Moreover, using an actual cost plus a reasonable profit standard for cable programming service equipment and installations will best protect subscribers from paying unreasonable rates in this area, as Congress intended. The standard will enable operators to charge at least what they could charge in a competitive market, and thus, will be fair to both systems and subscribers. Accordingly, the costs of equipment used to receive cable programming services shall be included in the Equipment Basket and the charges associated with this equipment shall be determined on the same basis as charges for other equipment subject to the actual cost methodology. However, because the Commission has jurisdiction over cable programming services, the Commission will review any complaints or issues concerning such equipment.

(b) Unbundling of Rates for Installation and Rental of Equipment Used to Receive Cable Programming Services

i. Background.

408. In the Notice, we tentatively concluded that, based upon the language and legislative history of the Cable Act of 1992, rates for equipment and basic service should be

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[992] Communications Act § 623(b)(3)(A) and (B), 47 U.S.C. § 543(b)(3)(A) and (B).

[993] Para.283, supra.

unbundled from one another.[994] We also concluded that rates for installation "should not be bundled with rates for lease of equipment."[995] We stated our belief "that this unbundling could help to establish an environment in which a competitive market for equipment and installation may develop."[996] We also sought comment on whether we should adopt uniform rules to govern regulation of rates for equipment used to receive the basic tier and for equipment falling within the definition of cable programming service.[997]

ii. Comments.

409. Many parties argue that the Commission should unbundle rates for the lease of equipment and installation from rates for all cable services, including cable programming and pay per program and per channel services.[998] They contend that this will help promote a competitive equipment market.[999] Other parties, mainly cable operators, argue strongly against the unbundling of all equipment and installation rates from basic service, (as well as installation from equipment rates)[1000] and by implication, against the unbundling of these rates from cable programming and pay per program or per channel services.[1001] For example, Encore argues that the Commission should allow bundling of per channel programming with equipment that is necessary or desirable for the receipt of that service.[1002]

iii. Discussion.

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[994] Notice, 8 FCC Rcd at 525, para. 63.

[995] Notice, 8 FCC Rcd at 525, para. 63.

[996] Notice, 8 FCC Rcd at 525, para. 63 citing Communications Act §624, 47 U.S.C. §544.

[997] Notice, 8 FCC Rcd at 531, n.129.

[998] See, e.g. NYNEX Comments at 11; Austin Comments at 54; Multiplex Comments at 12-13; CFA Reply Comments at 14.

[999] See, e.g. SquareD Comments at 4; EIA Comments at 4-5; CFA Reply Comments at 15.

[1000] AdelphiaII Reply Comments at 38.

[1001] See, e.g. TimeWarner Comments at 59-60 and 64-65; Falcon Comments at 47.

[1002] Encore Comments at 9-10.

410. We conclude that cable operators should be required to unbundle equipment and installation rates from rates for cable programming services, and also unbundle installation rates from equipment rates used solely to receive these services. While Section 623 of the Cable Act of 1992 does not explicitly direct us to take this action, we find that it will enhance customers' and this Commission's ability to assess the reasonableness of any charges for equipment provided as part of cable programming services. It will also serve the statutory purpose of promoting "the commercial availability, from cable operators and retail vendors that are not affiliated with cable systems, of converter boxes and of remote control devices compatible with converter boxes."[1003] We have found, in the common carrier service and equipment markets, that unbundling of service rates from equipment rates has been essential to creating the vigorous competition that now exists in the customers premises equipment market.[1004] On the other hand, we have found bundling can eliminate virtually all competition for certain services, "because bundling forces...subscribers to pay...for services even when the subscribers obtain them from other sources."[1005] We believe that these findings are equally pertinent to cable equipment and installation markets.

411. Section 2(b)(5) of the Cable Act of 1992 states that one of the policies the Act is designed to promote is "ensur[ing] that cable operators do not have undue market power vis-a-vis ... consumers."[1006] Bundling of equipment and services is one industry practice that Congress has identified as contributing to the market power of cable operators.[1007] We believe that by requiring the unbundling of all cable service rates from equipment and installation, as well as the unbundling

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[1003] Communications Act §624, 47 U.S.C. §544.

[1004] See Detariffing the Installation and Maintenance of Inside Wiring, Third Report and Order, 7 FCC Rcd 1334, 1335, at para. 8 (1991); see also Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384, 441-447 (1980), modified on recon. 84 FCC 2d 50 (1981), aff'd sub. nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied 461 U.S. 938 (1983).

[1005] Detariffing the Installation and Maintenance of Inside Wiring, Third Report and Order, 7 FCC Rcd 1334, 1335, para. 8 (1991).

[1006] Cable Act of 1992, Section 2(b)(5).

[1007] See Senate Report at 19-20.

of equipment and installation rates from each other, we promote this legislative goal.[1008]

412. For these reasons we find that it is in the public interest to require the unbundling of rates for cable programming services from rates for installation and the lease of equipment.[1009] We also find that the public interest will be served by requiring the unbundling of installation rates for these services, from rates for equipment leasing. We believe that subscribers will not only have more choices in purchasing and leasing these services as a result of such unbundling, but will also benefit from lower rates that occur as a result of competition we anticipate will develop.

5. Provisions Applicable to Cable Service Generally

a. Geographically Uniform Rate Structure

i. Background.

413. The Cable Act of 1992 requires cable operators to "have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system."[1010] The Notice proposed regulations which require a uniform rate structure throughout the geographic area served by the cable system, but tentatively concluded that geographic rate uniformity does not prohibit reasonable categories of service with separate rates and terms and conditions of service.[1011] The Notice noted further that the uniformity requirement did not preclude reasonable discriminations in rate levels among different categories of customers, provided the rate structure containing the

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[1008] More generally, we have found in common carrier regulation that, "[i]n general, bundling of goods and services may restrict the freedom of choice of consumers and restrains their ability to engage in product substitution." Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384, 441-447 (1980), modified on recon. 84 FCC 2d 50 (1981), aff'd sub. nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied 461 U.S. 938 (1983).

[1009] We note that the Communications Act provides us with the authority necessary to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions." Communications Act § 4(i), 47 U.S.C. § 154(i).

[1010] Communications Act, § 623 (d), 47 U.S.C. § 543 (d).

[1011] Notice, 8 FCC Rcd at 534.

differentiations is uniform throughout a cable system's geographic service area.[1012] The Notice sought information concerning the extent to which cable operators currently offer discounted rates and other special terms and conditions to some customers or types of customers, and solicited comment on whether cable operators should be afforded the flexibility to establish bona fide service categories with separate rates and service terms and conditions.[1013] The Notice also sought comment on the meaning of "geographic area."[1014] The Notice noted that "geographic area" could be interpreted to mean franchise area or the contiguous area served by a cable system.[1015] The Notice requested comment on the advantages and disadvantages of interpreting geographic area as synonymous with franchise area or as encompassing a greater area.[1016]

ii. Comments.

414. A substantial number of commenters, including cable operators,[1017] municipalities,[1018] and the Consumer Federation of America,[1019] the Community Antenna Television Association,[1020] and a joint comment from NATOA, League of Cities, the US Conference of Mayors and National Association of Counties,[1021] support giving cable operators some discretion to establish reasonable categories of service with separate rates

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[1012] Notice, 8 FCC Rcd at 534.

[1013] Notice, 8 FCC Rcd at 534.

[1014] Notice, 8 FCC Rcd at 535.

[1015] Notice, 8 FCC Rcd at 535.

[1016] Notice, 8 FCC Rcd at 535.

[1017] MCATC Comments at 36-38; CIC Comments at 88-89; AdelphiaII Comments at 120, 125-130; Nashoba Comments at 118, 131-132; Cox Comments at 84-85; Newhouse Comments at 44-47; Comcast Comments at 64; Blade Comments at 13; Time Warner Comments at 68-69; Carib Comments at 22; NCTA Comments at 77-79; TCI Comments at 60-63; Harron Comments at 10-11; Viacom Reply Comments at 14-15.

[1018] ThousandOaks Comments at 5; Palm Desert Comments at 13-14; New Bedford Comments at 7; CalCities Comments at 13-14; NYC Comments at 5-6.

[1019] CFA Comments at 159-160.

[1020] CATA Comments at 36-37.

[1021] NATOA Comments at 79-80.

and terms and conditions of service. Comments by Tele-Communications, Inc. and Harron Communications Corporation, and the Reply Comment by Continental Cablevision Inc. contend that uniformity of rate structures rather than rate levels was intended by the Act.[1022] These comments variously support vesting cable operators with discretion to negotiate individual contracts, offer promotional rates, impose line extension charges, establish bulk and commercial rates, and offer discounts to senior citizens, lower income households, the handicapped or other special groups.

415. Some commenters, however, claim that certain types of rate structures and/or special categories of customers should not be permitted. Twelve cities filed separate but similar comments opposing class discounts for senior citizens and other groups, individually negotiated contracts and bulk discounts unless the cable operator absorbs the cost difference for such discounts.[1023] The City of Miami Beach filed comments opposing differential offerings other than those discounts statutorily prescribed, including discounts for senior citizens, those with low incomes and the hearing impaired.[1024] Lorna Veraldi, a communications professor, filed extensive comments opposing bulk contracts as an anticompetitive form of predatory pricing, absent convincing evidence that they reflect savings in service and other costs.[1025] Certain commenters expressly opposed individually negotiated contracts but favored other non-uniform rates.[1026] The Wireless Cable Association International, Inc. opposes any discrimination based on whether a competitive alternative is available.[1027]

[1022] TCI Comments at 60-63; Harron Comments at 10-11; Continental Cablevision Reply Comments at 9; Time Warner Reply Comments at 52.

[1023] Paducah Comments at 28-29; Carson Comments at 28-29; McKinney Comments at 28-29; Parsippany Comments at 28-29; BowlingGreen Comments at 28-29; Key West Comments at 28-29; Drexel Comments at 28-29; New Bern Comments at 28-29; Conneaut Comments at 28-29; St. Petersburg Comments at 29-30; Williamston Comments at 28-29.

[1024] Miami Beach Comments at 21.

[1025] Veraldi Comments at 3-4, 7.

[1026] Hollywood Reply Comments at 9-10; Wireless Reply Comments at 6-7; Liberty Reply Comments at 4-6.

[1027] Wireless Comments at 2-5.

416. Several commenters generally supported giving cable operators the right to offer non-uniform rates, but added certain provisos to the cable operator's discretion. The League of California Cities[1028] noted that discounts should be part of the Basic Service Tier. Comments by the MCATC and reply comments by Liberty Cable Company asserted that special packages should be allowed where justified and reasonable, and that justification should be made part of the public record and the parties able to appeal to the Commission.[1029] Comments by Palm Desert, California further contended that group discounts for senior citizens or others must be available to all members of the group and subject to local regulation and governmental approval.[1030] Comments by the Mayor of the City of New Bedford, Massachusetts asserted that discounts for senior citizens and those with low incomes must be enforceable by the local franchising authorities, that the eligibility criteria should be clearly defined and that it should not be burdensome for the elderly or other groups to verify eligibility.[1031]

417. The majority of the commenters[1032] favor defining geographic area as franchise area, thus limiting the rate structure uniformity requirement of the statute to the franchise area.[1033] Several note that public policy and the legislative

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[1028] CalCities Comments at 13-14.

[1029] MCATC Comments at 37-38; Liberty Cable Company Reply Comments at 4-6.

[1030] Palm Desert Comments at 13-14.

[1031] New Bedford Comments at 7.

[1032] CIC Comments at 83, 86, Reply Comments at 55-57; Armstrong Comments at 33-34; MCATC Comments at 39-40; Cablevision Comments at 25; InterMedia Comments at 35; AdelphiaII Comments at 119-125; Nashoba Comments at 126-130; Cox Comments at 80-82; Comcast Comments at 64; Time Warner Comments at 70-74; Carib Comments at 23; Continental Comments at 58-63; NCTA Comments at 77-79; San Diego Comments at 2; CalCities Comments at 13-14; NYSCCT Comments at 9-10, 15-17; NATOA Comments at 79-80; GTE Comments at 12; Cole Comments at 45-48; Palm Desert Comments at 12; NAB Reply Comments at 24; Ventura Reply Comments at 6. ThousandOaks Comments at 5, however, support uniformity on the franchise area when topographically separated from other system franchises and/or its costs factors differ significantly from those of adjacent franchise areas.

[1033] Comments by Cole at 45-48 and the City of Mesa, Arizona at 4 question whether "franchise area" means the area licensed by the city for service or the actual service area. AdelphiaII, Reply

history of the Cable Act dictate such a definition,[1034] while others assert that costs vary by franchise area and that requiring system-wide uniformity would require low-cost franchises to subsidize higher cost ones.[1035] NYSCCT urged the Commission to require uniformity of basic rates on a franchise basis, but noted that the Commission should have the discretion to apply uniform rates to the entire cable system to determine reasonableness of rates and reduce administrative burdens.[1036] Several commenters noted that joint certification by affected franchising authorities would eliminate the chief problem with system-wide rate uniformity.[1037]

418. Two cable operators,[1038] eight municipalities,[1039] and the American Public Power Association[1040] filed comments in support of system-wide rate uniformity of standard services. Some commenters[1041] urge that geographic area should mean a contiguous area served by single headend while the American Public Power Association Reply Comments argued against this definition.[1042] The City of Glasgow argued that geographic area should be defined to include all cable systems operated by an MSO in a state.[1043]

Comments at 67, asserted that the area licensed rather than the actual service area was clearly contemplated. For purposes of this proceeding, "franchise area" is the area licensed for service.

[1034] See, e.g., CIC Comments at 83-87; Cox Comments at 80-82; Cole Comments at 45-48.

[1035] See, e.g., Comcast Comments at 64; Carib Comments at 23.

[1036] NYSCCT Comments at 9-10, 15-17.

[1037] See, e.g., Continental Comments at 58-63; Mesa Comments at 4.

[1038] Liberty Comments at 10; Newhouse Comments at 45 (uniformity on a system-wide basis but operator should be able to charge different rates between franchise areas if costs differ).

[1039] North Redington Comments at 2; New Bedford Comments at 7-8; Manitowoc Comments at 5; Miami Beach Comments at 20-21; Minn Comments at 23; Somerville Comments at 8; Bandon Comments at 1.

[1040] APPA Comments at 1-11; Reply Comments at 1-2.

473 See, e.g., Bandon Comments at 1.

[1042] APPA Reply Comments at 6-7.

[1043] Glasgow Comments at 4.

419. Some commenters suggested that cable operators be permitted to offer special rates categories to certain groups, e.g., commercial establishments and multiple dwelling buildings. Foe example, Cole argues that cable operators must be permitted to establish bona fide service categories with different rates. Cole specifically includes among these categories the hotel/motel industry with its seasonal and/or transient customers which, along with other commercial establishments, require "customized" commercial agreements between the cable operator and commercial establishment.[1044] Some franchising authorities argue that reasonable and non-discriminatory bulk discounts often offered by cable operators to multiple dwelling buildings should be permitted under Section 623(e), so long as all multiple dwelling buildings in the area have an opportunity to negotiate such contracts.[1045] However, several other local franchising authorities believe that such bulk discounts often result in price discrimination against individual subscribers.[1046] Cable operators generally agree that bulk discounts should be permitted because such discounts allow cable systems to meet competition from alternative providers such as SMATV and MMDS.[1047] Some alternative video programming providers argue that cable operators' bulk discounts to multiple dwelling buildings are often just a means of predatory pricing by cable operators to obstruct competition from alternative providers.[1048]

420. Some franchising authorities believe that Section 623(e) permits them to adopt anti-discriminating regulations that are consistent with the Cable Act and our implementing rules.[1049] However, cable companies caution that the provision must not be read so broadly as to allow franchising authorities to regulate cable service rates in any manner above and beyond that explicitly permitted under the Cable Act and our implementing rules.[1050]

[1044] Cole Comments at 48-49.

[1045] See generally NATOA Reply Comments at 28 n. 63; NYC Reply Comments at 5-7.

[1046] Se, e.g. Parsippany Comments at 28-29; Drexel Comments at 28-29; New Bern Comments at 28-29; Paducah Comments at 28-29.

[1047] See generally Falcon Comments at 70-73: Time Warner Comments at 74-75.

[1048] Liberty Comments at 4-8; Nationwide Comments at 3-4.

[1049] NATOA Reply Comments at 28 n.63.

[1050] Falcon Comments at 76; Time Warner Comments at 78.

iii. Discussion.

421. The comments received indicate that there are a number of related issues that we need to address relating to the implementation of Section 623(d). First, is this provision applicable only to rates that are otherwise subject to regulation or is it applicable more broadly to both regulated and unregulated services in both effectively competitive and noncompetitive franchise areas? The wording of the statute does not provide a specific answer to this question. Section 623(a)(2) generally provides that "[i]f the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section." (Emphasis added). Other provisions of Section 623 also generally exempt "video programming offered on a per channel or per program basis" from either federal or state regulation. Nevertheless, the uniform rate provision itself contains no limiting provisions. The general thrust of the rate regulation provisions of the Act is that as the markets involved become more fully competitive, regulation specific to the cable industry may be reduced and general provisions of the law relating to anticompetitive conduct more heavily relied on. This suggests that Section 623(d)'s focus is properly on regulated services in regulated markets.

422. Second, as indicated in the Notice the term "geographic area" must be defined. It could be interpreted to mean either the franchise area of a system or the contiguous area served. We conclude that a system's franchise area properly defines that "geographic area" within which uniformity of rate structures is mandated. Section 623(d) reveals a congressional intent to impose limits on the ability of cable operators to offer service under different rate structures within a service territory. Moreover, the legislative history reveals that Congress intended the franchise area to be the scope of the service territory within which the statute intended to limit cable operator discretion.[1051] The statute also envisions generally that local franchising authorities may prohibit discrimination by cable operators against subscribers of cable service. We believe that Section 623(e), which we discuss more extensively below, generally envisions that local franchise authorities shall exercise some regulatory oversight on the

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[1051] See Senate Report at 76 ("...cable operators must offer uniform rates throughout the geographic area in which they provide cable service. This provision is intended to prevent cable operators from having different rate structures in different parts of one cable franchise. This provision is also intended to prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor temporarily.")

categories of customers and service that the cable operator may establish within the franchise area. We believe that it would be an anomalous result to give a broad interpretation to geographic area, thus requiring, for example, that a rate structure must be uniform throughout a state or within a system, while at the same time investing local franchising authorities with some authority to determine the extent to which discrimination in rate structure may take place within the franchise area. A uniform rate structure requirement for an area larger than a franchise area could substantially limit local authorities' ability to exercise the power to prohibit discrimination. We do not believe that Congress intended this result. Accordingly, we conclude that for purposes of administration of Section 623(d), geographic area means franchise area. Thus, a cable operator is generally required by this provision to have a uniform rate structure within each franchise area.

423. Third, we need to address what is meant by the requirement that rate structures be uniform. May reasonable rate structures be allowed if uniformly applied to purchasers with the same class or must all subscribers be charged identical prices for identical service? The Act specifically mandates a uniform "rate structure." The legislative history does not reveal any congressional intent to mandate a uniform rate for all services and classes of customers. Indeed, Section 623(e) specifically contemplates special categories of customers may receive separate rates.[1052] Accordingly, we conclude that Section 623(d) does not preclude establishment of reasonable categories of customers and service by cable operators. Thus, for example, as suggested in the Notice, we do not believe that Congress intended a per se prohibition on differences in rates between seasonal and full-time subscribers. We also find that uniform, non-predatory bulk discounts to multiple dwelling units, including apartment buildings, hotels, condominium associations, hospitals, universities, and trailer parks, could form a valid basis for distinctions among subscribers. Introductory or promotional rates universally applied at a given time but subsequently discontinued would also not be prohibited. And, as is suggested by Section 623(e), discussed further below, reasonable discounts may be made to senior citizens or other economically disadvantaged groups and charges may be set to facilitate the reception of service by hearing impaired individuals. As we have previously discussed in our tier "buy-through" proceeding, technological differences in the service offered within a

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[1052] The Act permits cable operators to offer "reasonable discounts to senior citizens or other economically disadvantaged group discounts" and also allows cable operators to require and regulate "the installation or rental of equipment which facilitates the reception of cable service by hearing impaired individuals. Communications Act § 623(e), 47 U.S.C. § 543(e).

geographic area, such as might result from the staged rebuilding of a system, would also not conflict with this provision.[1053]

424. Liberty, an alternative video programming provider, asserts that cable systems often offer bulk discounts to individual multiple dwelling buildings for the sole purpose of thwarting potential competition from alternative providers.[1054] Moreover, some local franchising authorities argue that cable companies' bulk discounts to condominiums should be prohibited because this pricing scheme discriminates against ordinary subscribers who are unable to bargain with the cable operator for a volume discount.[1055] We are concerned that bulk discounts not be abused as a means of displacing alternative multichannel video distributers from multiple dwelling units, which have become important foothills for the establishment of competition to incumbent cable systems. However, we also are mindful that all multichannel distributors can realize significant efficiencies and cost savings by service multiple dwelling units and other high-occupancy buildings, and we do not wish to foreclose the prospect that those savings might be passed on to consumers in those dwellings. Therefore, we agree with NATOA that such discounts may be permitted,[1056] if they pass on cost savings of volume offerings to the subscribers affected. Because of our concerns about abuse, however, we establish the following conditions on such bulk offerings. First, all multiple dwelling buildings in the franchise area must receive the same bulk discount rate structure. Second, the operator must be able to demonstrate that he/she derives some economic benefit from providing the bulk rate discount.[1057] We believe that permitting such discounts will foster competition among video providers, furthering an objective of the Act.[1058] In addition, our

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[1053] See Report and Order, MM Docket No. 92-262, FCC 93-143 (released April 1, 1993), note 17.

[1054] Liberty Comments at 4-8. See also Nationwide Comments at 3-4.

[1055] Parsippany Comments at 28-29. See also McKinney Comments at 28-29; Drexel Comments at 28-29; New Bern Comments at 28-29.

[1056] NATOA Reply at 28 n.63.

[1057] Cf. Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265, First Report and Order, at para. 108 (adopted April 1, 1993; released April __, 1993) (discussing volume justification for price differentials).

[1058] See e.g., Cable Act § 2(b)(2).

substantive rate standards will ensure that other customers' rates will remain reasonable.

425. Finally, we agree with NATOA that Section 623 of the Cable Act grants certified franchising authorities the opportunity to regulate basic cable services, including any special rate categories such as bulk discounts.[1059] We also believe, however, that Section 623 must not be read so broadly as to permit franchising authorities to deviate from the principles articulated here with respect to those rate categories discussed below relating to senior citizens and disadvantaged group discounts and with service to the hearing impaired.[1060]

b. Discrimination

i. Background

426. Section 623(e) of the 1992 Cable Act states that no Federal agency, State or local franchising authority may be prohibited from:

> (1) Prohibiting discrimination among subscribers and potential subscribers to cable service, except that no [such] authority may prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantaged group; or
> (2) requiring and regulating the installation or rental of equipment which facilitates the reception of cable service by hearing impaired individuals.[1061]

The Notice tentatively concluded that we should explicitly permit the discounts contemplated in Section 623(e)(1), and permit local authorities to adopt anti-discrimination provisions consistent with the Cable Act and our implementing regulations. We sought comment on what economically disadvantaged groups other than senior citizens may be awarded reasonable discounts by operators pursuant to Section 623(e)(2). We also sought comment on whether to permit cable companies to charge different rates to different categories of customers based on differences in costs of providing service. Finally, we observed that Section 623(e)(2) does not preclude State or local authorities from adopting regulations concerning installation of equipment for the hearing impaired that are consistent with other provision of the Cable

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[1059] NATOA Reply Comments at 2,8 n.63.

[1060] See generally Falcon Comments at 76-77. See also Time Warner Comments at 78.

[1061] Communications Act, § 623(e), 47 U.S.C. § 543(e).

Act. We sought comment on whether it would be necessary to adopt specific rules concerning such equipment at this time.[1062]

ii. **Comments**

427. We received numerous comments supporting separate rate categories for senior citizens and/or the economically disadvantaged.[1063] Somerville, for example, believes that the Commission should establish a definition regarding who is economically disadvantaged and should ensure that the cable operator does not make it burdensome for members of such groups to avail themselves of discounts.[1064] NATOA believes that the Commission should refrain from establishing a federal definition of "economically disadvantaged" because such status may vary from region to region.[1065] On the other hand, Parsippany opposes lower rate categories for senior citizens and the economically disadvantaged, arguing that their service costs the same as service to all other groups and that remaining subscribers should not have to subsidize their lower rates.[1066]

428. Nationwide argues that separate rate categories should be limited to those specified in Section 623(e) -- to senior citizens and/or economically disadvantaged groups. Nationwide believes that creating numerous rate categories would undermine the statutory goal of preventing rate discrimination and enable the cable operator to inflate rates in one category in order to subsidize lower rates in another category that might be subject to competition.[1067]

429. Finally, commenters generally agree that Section 623(e) permits local franchising authorities to regulate the installation and offering of equipment for reception of cable service by the hearing impaired.[1068] In addition, NCI notes that

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[1062] Notice, 8 FCC Rcd at 535.

[1063] See, e.g., Palm Comments at 13; Somerville Comments at 7; Falcon Comments at 76-77.

[1064] Somerville Comments at 7.

[1065] NATOA Comments at 80.

[1066] Parsippany Comments at 28.

[1067] Nationwide Comments at 6-7.

[1068] Time Warner Comments at 78; Falcon Comments at 76; NCI Comments at 2.

the legislative history endorses increased close-captioning of cable programming.[1069]

iii. Discussion

430. As proposed in the Notice and as many commenters urge, we will specifically permit reasonable discounts for senior citizens and other economically disadvantaged groups. We define members of other economically disadvantaged groups as individuals who receive federal, state or local welfare assistance.[1070] Cable operators will also have the discretion to create subcategories of economically disadvantaged individuals, so as to limit the scope of discounts that may be available, if a rational basis exists for such subclassification.[1071] As discussed above, we construe the uniform rate structure requirements of Section 623(d) to permit establishment of reasonable categories of service by cable operators.[1072] The discounts permitted under Section 623(e) for senior citizens and other economically disadvantaged groups are consistent with our previous discussion. They must be offered equally to all those who qualify as members of these categories, or reasonable subcategories of them. A local franchising authority or other governmental entity may not prohibit cable systems from offering reasonable discounts to all senior citizens or members of economically disadvantaged groups in the franchise area.

431. We also believe that the "discrimination" which Section 623(e) entitles federal, state and local authorities to prohibit does not include reasonable categories of subscribers based on justifiable differences in the economic benefits the

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[1069] NCI Comments at 2 (citing House Report at 93).

[1070] Examples of such assistance at the federal level would be Supplemental Security Income (SSI) or Aid to Families with Dependant Children (AFDC). We believe that this definition will permit cable operators and franchise authorities the flexibility to take into account regional and economic differences. See generally NATOA Comments at 80.

[1071] As discussed supra Section II.A.3.c.(1)(d), a cable operator may offer only a single basic service tier. Therefore, an operator may not offer an inexpensive "lifeline" tier consisting of fewer channels than the operator's basic tier.

[1072] Section 623(d) states that a cable operator shall have a rate structure for the provision of cable service that is uniform throughout the geographic area in which cable service is provided over its cable system. Communications Act, § 623(d), 47 U.S.C. §543(d).

operator derives from serving such categories. As stated in supra Section II.A.5.c, the local franchising authority and the Commission will address the reasonableness of such categories as the need arises in concrete situations.

432. We agree with those commenting on the issue that Section 623(e) permits governmental authorities to regulate the installation and offering of equipment for the hearing impaired.[1073] NCI observes that the legislative history of the 1992 Cable Act indicates that the percentage of closed-captioned programs carried by cable is well below that of traditional broadcasters.[1074] Accordingly, the Commission strongly encourages cable operators to carry more closed-captioned video programming. Franchising authorities are free to adopt specific regulations regarding the installation and offering of equipment for reception of cable service by the hearing impaired. In the absence of any record evidence indicating that federal intervention in this area is necessary, we decline to adopt specific closed-captioning rules for cable at this time.

c. Negative Option Billing

i. Background

433. Section 623(f) of the Cable Act provides that an operator may not charge a subscriber for "any service or equipment that the subscriber has not affirmatively requested by name."[1075] The Notice tentatively concluded that an affirmative request for service or equipment may occur orally or in writing, so that the subscriber has flexibility to order by either method. We also tentatively concluded that an operator should not be permitted to charge for any service or equipment that would be in violation of Section 623(f) of the Act or the Commission's implementing rules, and sought comment on other enforcement questions.[1076]

434. The legislative history states that Section 623(f) does not apply to "changes in the mix of programming services that are included in various tiers of cable service."[1077] The Notice thus sought comment on the types of

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[1073] See e.g. Time Warner Comments at 78; Falcon Comments at 76.

[1074] NCI Comments at 2 (citing House Report at 93).

[1075] Communications Act, § 623(f), 47 U.S.C. § 543(f).

[1076] Notice, 8 FCC Rcd at 535, para. 119.

[1077] Conference Report at 65.

tier changes and equipment upgrades that may be made without violating the negative option billing restriction. The Commission also sought comment on how this provision should apply to initial implementation of the basic cable service rate structure.[1078]

ii. Comments

435. Most parties agree with the tentative conclusion in the Notice that an affirmative request for service by a subscriber may be made orally or in writing.[1079] NATOA agrees with the tentative conclusion in the Notice that an operator should not be permitted to charge for service or equipment in violation of Section 623(f) of the Act and of the Commission's implementing rules. NATOA argues that in such case the operator must refund any amounts collected.[1080]

436. Cable interests would generally exclude from the scope of the negative option billing provision changes in tier composition[1081] and equipment upgrades,[1082] even when these are accompanied by price increases.[1083] Cable interests would also exclude initial retiering on the part of cable companies appropriate for implementation of the Act's rate structure.[1084] MCATC would subject to the provision a service package substantially different from that previously provided to subscribers at an additional cost, but exclude minor tier changes

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[1078] Notice, 8 FCC Rcd at 536, paras. 120, 121.

[1079] Notice, 8 FCC Rcd at 535, para. 119; Continental Comments at 69-70; Cox Comments at 90; CIC Comments at 96; NATOA Comments at 85; Miami Comments at 21; NMCC Comments at 5.

[1080] Notice, 8 FCC Rcd at 535, para. 119; NATOA Comments at 85.

[1081] See, e.g., Comcast Comments at 65; Adelphia II Reply at 73; NCTA Comments at 80; Armstrong Comments at 34; Intermedia Comments at 35. See also TCI Comments at 66-67 (revenue-neutral unbundling, retiering and repackaging of services and equipment not within scope of negative option billing provision); Cole Reply at 35 (revenue-neutral changes in programming in a tier should be exempt from negative option billing rules).

[1082] See, e.g., Cole Comments at 52-53.

[1083] See, e.g., Falcon Comments at 80-81; CSC Comments at 18-19; Cox Comments at 91; CIC Comments at 96. See also Encore Comments at 20-21.

[1084] See, e.g., TCI Comments at 65-66; Cole Comments at 52-53; Falcon Comments at 80-81.

and "normal" price increases.[1085] Some cities and consumer groups take a more restrictive approach, however.[1086] CFA would subject any changes in service accompanied by price changes to the negative option billing provision.[1087] Some municipalities argue that revenue neutrality should not be the test, because an operator could simply move a channel to a deregulated tier and later raise the price.[1088] If, in initial implementation, a cable operator splits its basic service into a new basic and an expanded basic and increases the price, CFA would apply the negative option billing provision so that subscribers could not be automatically billed for expanded basic.[1089]

437. CFA and Massachusetts endorse the proposal in the Notice to require 30-days notice for tier changes or equipment upgrades accompanied by a price increase.[1090] Minnesota believes that if a service or equipment is eliminated, subscribers must receive at least 90 days notice of tiering changes.[1091]

iii. Discussion

438. We find that, under the 1992 Cable Act, to be billed for any cable service a subscriber must affirmatively request such service. Such requests can be made orally or in

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[1085] MCATC Comments at 29-31.

[1086] See, e.g., Miami Comments at 21; See also NATOA Comments at 85-86 (provision should apply if subscriber has to pay more for the same programming because it was divided on two tiers, or operator creates two tiers and forces subscribers to take the more expensive tier).

[1087] CFA Comments at 158; CFA Reply at 83-53.

[1088] Austin Comments at 69-70 (citing case in Gillette, Wyoming, where operator moved subscribers from regulated basic to expanded, but deregulated, basic for same price, but where rates could later rise without regulatory scrutiny).

[1089] CFA Comments at 159.

[1090] Notice, 8 FCC Rcd at 536, para. 120; MCATC at 34 (provided price increase justified under our rules); CFA Comments at 159 (also arguing change should be subject to negative option billing, however). See also Austin Comments at 71.

[1091] Minnesota Comments at 24.

writing.[1092] We also agree with the consensus in the record that an operator should not be permitted to charge for any service or equipment provided in violation of Section 623(f) of the Act and the Commission's implementing rules.

439. As suggested in the Notice,[1093] issues arising under the negative option billing provision may often be contractual in nature, and capable of being redressed in the local courts. For example, subscribers charged in violation of the statute and our rules would not have to pay the illegal charge. Should the operator believe the charge is permissible, the onus would be on it to attempt to collect through the judicial process. However, our existing procedures would also be available in cases involving, for example, interpretation of our rules or definitions, that would be more easily and appropriately resolved by the Commission as an expert agency.[1094] In either case, our forfeiture provisions would apply to violations of Section 623 (f) or our negative option billing rules and could be used to help deter or correct any patterns of violation of these rules.[1095]

440. The statutory language on negative option billing applies to "any service or equipment."[1096] The legislative history, however, clarifies that Section 623(f) does not apply to changes in the mix of programming in a tier.[1097] We conclude

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[1092] This will permit subscribers accustomed to being able to change or order service over the telephone to continue to make such oral service requests. We clarify, at Lenfest's request, that affirmative subscriber requests made electronically, (e.g. Audio Response Units or Automatic Number Identification, used for pay-per-view and premium channels), are considered affirmative requests. Lenfest Comments at 9.

[1093] Notice, 8 FCC Rcd at 535, para. 119.

[1094] See, e.g., 47 C.F.R. Part 1 (Practice and Procedure); 47 C.F.R. § 76.7 (cable special relief procedures).

[1095] 47 U.S.C. § 503 (b)(2) and (6)(B). Some municipalities argue that state and local governments should have concurrent enforcement powers over negative option billing practices. Austin Comments at 71-72. We do not preclude state and local authorities from adopting rules or taking enforcement action relating to basic services or associated equipment consistent with the implementing rules we adopt and their powers under state law to impose penalties.

[1096] Communications Act, § 623 (f); 47 U.S.C. § 543 (f).

[1097] Conference Report at 65.